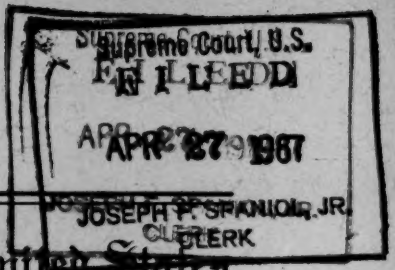

No. 86-1358

In the Supreme Court of the United States

OCTOBER TERM, 1986

RAOUL CRUZ, PETITIONER

v.

MARINE TRANSPORT LINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner, a seaman who alleges that he suffered injuries aboard a public vessel, seeks to sue respondent, a private company that operated the vessel under contract with the United States. Petitioner challenges the lower courts' conclusion that under 46 U.S.C (Supp. III) 745 his exclusive remedy (now time-barred) was against the United States, because respondent acted as an agent of the United States.

1. The *USNS Sealift Pacific* is a public vessel used to transport petroleum products for the Department of Defense. The ship was operated by respondent Marine Transport Lines pursuant to a written agreement between it and the government. Petitioner, a civilian crew member, alleges that he was injured on the ship in August 1982 when the hoses connected to a pump broke, spraying him with chemicals. In July 1984, approximately one month before the expiration of the two-year limitation period of the

Public Vessels Act, 46 U.S.C. (Supp. III) 781 *et seq.*, petitioner brought suit against the United States under that Act. Because the summons and complaint were not served in the "forthwith" manner required by 46 U.S.C. (Supp. III) 742, the action was dismissed for lack of jurisdiction. Petitioner filed an appeal but then withdrew it.[1] Pet. App. 5a-9a.

Petitioner subsequently commenced this action against respondent under the Jones Act, 46 U.S.C. (Supp. III) 688, seeking recovery for the same injury. The government contended that 46 U.S.C. (Supp. III) 745 bars that claim.[2] Section 745 provides that "where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim." Petitioner contended that under the facts of this case Marine Transport was not an "agent" of the United States.

The district court dismissed the complaint (Pet. App. 1a-22a). After reviewing the agreement between the government and Marine Transport, the court concluded that "Marine Transport indeed acted as the 'agent' of the United States within the meaning of 46 U.S.C. § 745" (Pet. App.

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[1]Petitioner ambiguously states that the appeal was "withdrawn with the consent of the Government in order to proceed with the instant case" (Pet. 9). It is true that the appeal was "withdrawn with the consent of the Government." But if petitioner intends to suggest by that statement that government counsel agreed that he should be permitted to proceed with this suit against Marine Transport, he is wrong, and nothing in the record supports such a claim.

[2]Section 745, which is part of the Suits in Admiralty Act, 46 U.S.C. (Supp. III) 741 *et seq.*, is incorporated by reference into the Public Vessels Act by 46 U.S.C. (Supp. III) 782, as the district court concluded (Pet. App. 11a). See, *e.g.*, *In re United States*, 367 F.2d 505, 508-509 (3d Cir. 1966), cert. denied, 386 U.S. 932 (1967).

17a). The court therefore held that, under the plain language of Section 745, petitioner's "sole remedy, although now time barred, was against the United States" (Pet. App. 22a).[3] The court of appeals affirmed without opinion (*id.* at 23a-24a).

2. Petitioner argues that the courts below incorrectly concluded that, under the terms of their agreement, Marine Transport acted as an agent of the United States within the meaning of Section 745. There is no merit to this fact-bound claim. Petitioner does not allege, nor is there, a conflict in the circuits on any question relating to how it is determined whether an operator of a vessel is an agent under Section 745. Accordingly, this case does not merit further review.

The district court correctly concluded, on the basis of the contract between the United States and respondent, that respondent acted as an agent of the United States. The contract requires operation of the vessel " 'solely in the public use or in the protection of the national interest' " (Pet. App. 18a (citation omitted)). It further provides that the government, not Marine Transport, controls all matters relating to the vessel's voyages and cargoes (*id.* at 18a-19a). As an affidavit of counsel to the Military Sealift Command (MSC) stated, the *USNS Sealift Pacific* is " 'under the

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[3]The district court also considered petitioner's contention that the United States lacked standing to argue that the suit against respondent should be dismissed. The court noted that in *Carter* v. *American Export Isbrandtsen Lines, Inc.*, 411 F.2d 1185, 1186 (2d Cir. 1969), the court stated that 28 U.S.C. 547 provides that government attorneys shall defend all civil actions in which the United States is concerned and concluded that, since the private vessel operator in that case was an agent of the United States, representation by the United States was proper. The district court here held that "since Marine Transport is the agent of the United States, * * * the filing of the within motion by the United States is proper" (Pet. App. 8a).

exclusive operational control of MSC, sailing only when and where ordered by the MSC Tanker Division' " (*id.* at 21a (citation omitted)).[4]

Petitioner contends (Pet. 16) that Marine Transport is properly characterized as an independent contractor rather than as an agent. However, as the district court concluded, "even if [Marine Transport Lines] was an independent contractor as plaintiff asserts or it handled the day to day working of the ship, the relationship between the United States and Marine Transport was that of principal and agent by virtue of the United States' 'exclusive operational control' over the USNS Sealift Pacific" (Pet. App. 21a-22a).

Other courts have similarly concluded that operators of public vessels were agents of the United States under Section 745 even if they might also be characterized as independent contractors. In *Smith* v. *United States*, 346 F.2d 449, 453-454 (4th Cir.), cert. denied, 382 U.S. 878 (1965), the plaintiff, a seaman making a Jones Act claim, alleged, as does petitioner, "a bare-boat charter out of the Government to Marine [Transport Lines, the respondent here] with a time charter back from Marine to the Government." The court held that "[w]hether the agreement constituted Marine a charterer, an owner pro hac vice or an independent contractor is merely an academic ascertainment. In any of these capacities Marine could still be an agent." *Ibid.* Similarly, in *In re United States*, 367 F.2d 505, 509 (3d Cir. 1966), cert. denied, 386 U.S. 932 (1967), the court held that "[t]he

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[4]Petitioner notes (Pet. 15) that the legislative history of Section 745 indicates that it would not bar suits against operators of vessels merely because the government owned the vessel. That is correct, but does not support petitioner's argument. As Section 745 plainly provides, suit is not barred against an operator merely because the United States owns the ship; rather, suit is barred only if the operator is an agent of the United States. Here, as the district court concluded, Marine Transport is an agent of the United States because of the government's operational control over the vessel.

accepted distinction between 'servant' and 'independent contractor' may place [the operator of the ship] in the latter category, since it is arguable that [the operator's] day to day working of the ship was not subject to government control. See Restatement, Agency, 2d, § 2. But an independent contractor, no less than a servant may be an agent in that he is employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control and direction * * *. Restatement, Agency, 2d, § 14 N."[5]

Petitioner cites no case where an operator of a public vessel was not found to be an agent within the meaning of Section 745. He notes (Pet. 27-28) that in *Chowaniec* v. *United States*, 149 F. Supp. 251 (S.D.N.Y. 1956), an operator of a public vessel was found liable for an injury to a seaman. But that district court decision is irrelevant because the operator of the vessel in that case failed to argue that suit against it was barred by the exclusive remedy provision. See *Smith*, 346 F.2d at 455 n.1 (Bell, J., dissenting).

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[5]Petitioner distinguishes *In re United States*, *supra*, on the ground that the operator in that case was compensated on a cost-plus basis while Marine Transport was paid pursuant to a fixed-price contract (Pet. 21-22). But petitioner makes no attempt to explain why the mode of compensation should be dispositive in ascertaining whether a contractor is an "agent." While the Third Circuit in *In re United States* noted that the operator there was compensated on a cost-plus basis, that fact was not critical to the court's decision, which instead turned on the fact that the operator "was in significant ways subject to the government's direction and control" (367 F.2d at 509). The Third Circuit evidently does not regard its prior decision in *In re United States*, *supra*, as turning on the mode of compensation involved, since the Third Circuit also wrote the decision below. Petitioner simply suggests no reason why an operator subject in significant ways to the government's direction and control, like Marine Transport, should not be considered an agent of the United States merely because it was paid pursuant to a fixed-price contract.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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